IN THE

Supreme Court of the United States

October Term, 1945.

No. 444

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM and WILLIAM C. BLOOM,

Petitioners,

vs.

RKO RADIO PICTURES, INC., a corporation, LOEW'S, INCORPORATED, a corporation, TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, PARAMOUNT PICTURES, INC., a corporation, BALABAN & KATZ CORPORATION, a corporation, VITAGRAPH, INC., a corporation, WARNER BROS. PICTURES, INC., a corporation, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, a corporation, and WARNER BROS. THEATRES, INC., a corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

OPINION BELOW

The opinion of the Circuit Court of Appeals appears in the Record at page 2263. It has not yet been reported. The District Court filed no opinion.

II.

STATEMENT OF THE CASE

The petitioners are the operators of the Jackson Park Theatre, a neighborhood theatre in Chicago. Dissatisfied

with their alleged inability to bid for playing position, that is, runs and clearance, they brought this private action under the antitrust laws. The jury's verdict was for $120,000 which, trebled and increased by an allowance for attorneys' fees, resulted in a judgment for $390,000. (R. 2127, 2246.) The Circuit Court of Appeals granted judgment *non obstante veredicto* because, on the facts of this case, the petitioners had not offered satisfactory proof of the fact of damage within the rule of *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, *William Iz Rankin Co.* v. *Associated Bill Posters of U. S.*, etc., 2 Cir., 42 F. 2d 152, and *Baush Mach. Tool Co.* v. *Aluminum Co. of America*, 2 Cir., 79 F. 2d 217.

Motion pictures are distributed by licensing competing theatres to exhibit them in successive exhibition periods or "runs". Priority of run generally increases the value and cost of film licenses. Exclusiveness of run is another factor in the value of licenses. A provision for exclusiveness, limited as to time and area, in film licenses is called "clearance". (R. 210, 211, 395, 396, 398, 1095, 1096.)

Since at least 1927, the respondent distributors in Chicago have licensed their pictures according to a recognized pattern of runs and clearance, described in the opinion below (R. 2265, 2266), and have selected the theatres which they desired to exhibit their pictures on each run and have licensed each theatre so selected for a prior run before negotiating licenses for the next subsequent run. (R. 892, 893, 929, 948-950, 966, 996-998, 1125.) This method of licensing is sometimes called the "Chicago system of release". During these years the petitioners' theatre has been licensed consistently to exhibit pictures on the fifth Chi-

cago run, which, after the expiration of the runs and clearances granted to prior run theatres, made pictures available to it 10 weeks after Chicago first run. (R. 164, 203, 204.) Competing theatres operated by the respondent exhibitors have been licensed to exhibit these pictures on each of the four prior runs, the same run, and the next subsequent run. (R. 203-207.)

The petitioners have not questioned the necessity or lawfulness of runs and clearance. They claim, however, to have been prevented by a conspiracy among the respondents to maintain the "Chicago system of release" from competing freely for runs and clearance, on the basis of their willingness and ability to pay for them, and they say that such conspiracy has assigned to their theatre arbitrarily the run and clearance on which it has been operating. The jury found such a conspiracy. In the Circuit Court of Appeals the respondents urged that there was no evidence of conspiracy to support the verdict, but that court held to the contrary. (R. 2270.) While we think that part of its opinion clearly wrong, it is unnecessary to discuss that issue here in view of the limited issue tendered by the petition.

Theatres in each subsequent run change their programs more frequently than theatres in the next prior run and so use more pictures. Thus, a part of the pictures used by the petitioners' theatre have been pictures not contracted for, or contracted for but not used, by one or more competing prior run theatres. These are called "clear" pictures. The pictures used by the prior run theatres were those which they deemed the best and were available to petitioners' theatre only after their exhibition in the prior run theatres. (R. 170, 171, 211.)

Double features (two feature pictures for a single admission price) were introduced in Chicago theatres in 1936. (R. 144, 283, 846, 847.) Petitioners claim that they were used by the respondents as part of their conspiracy and the Circuit Court of Appeals held that this view must be accepted under the evidence and the jury's verdict. (R. 2274.)

With double features, theatres playing on runs prior to the petitioners' theatre used more pictures, which then were not available "clear" to the petitioners' theatre. (R. 144-146, 174.) Such pictures thereby became less valuable to the petitioners. (R. 144, 145, 212.)

The sole issue raised by the petition is whether the Circuit Court of Appeals applied correct principles of law in reaching the conclusion that the petitioners failed to prove the fact of damage proximately resulting from the conspiracy.

The petitioners claimed to have lost profits as a result of not being able to bid for runs and clearance. Their evidence of damage was a comparison of their profits during the five years preceding the commencement of suit with their higher average profits during the preceding four years. (R. 475, 476, Pl. Ex. 48, R. 1713.)

The conspiracy which prevented the petitioners from bidding for runs and clearance was in effect long prior to and during both of these periods. The Circuit Court of Appeals held that proof that the petitioners in fact had suffered damage as claimed necessarily lay in a comparison of their profits actually made under the restrictions of the conspiracy with the profits which they could have made under a system wherein they could have bid for runs and clear-

ance. It held that the former was known and proved but that the latter was unknown and that the petitioners had made no attempt to prove it. It concluded that there was no evidence that petitioners had suffered any damage from the conspiracy. (R. 2272.)

The court below did not hold, as the petitioners contend (Pet., pp. 7, 8), that proof of what the petitioners could earn but for the conspiracy could lie only in evidence of profits made while the conspiracy was not in existence. It recognized that in some cases, typified by *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, there is evidence from which profits made during a period of monopoly or restraint of trade can be shown to have been no different than profits which would have been made in an open market, or can be shown to be different to an ascertainable extent. Such cases indicate another permissible way of showing "normal profits". In this case, however, the petitioners not only offered no evidence of profits made when free of the conspiracy, but offered no other evidence to show how the profits which they might have made free of the conspiracy would have compared with the profits which they did make under the conspiracy.

In suits for damages under the antitrust laws the fact of damage—proximate injury to the plaintiff's business or property—is as much a part of the plaintiff's cause of action as is the claimed violation of law. Such proof cannot be excused, nor can damage to the petitioners be presumed from proof of the conspiracy, as they seem to contend (Pet., pp. 7, 14.) The cases relied upon by the court below hold exactly the contrary and express the rule uniformly followed by this Court and other Federal courts. One of the

most recent cases on this point is *Clark Oil Co. v. Phillips Petroleum Co.*, 8 Cir., 148 F. 2d 580, certiorari denied by this Court, October 8, 1945.

The petitioners, claiming that the decision of the court below is contrary to, rather than supported by, the authorities therein cited, point out that such cases hold that the *amount* of the plaintiffs' damages (but not the *fact* of damage) may be approximated by reasonable inferences and in this connection point out that a plaintiff should not be required to prove exactly an amount in dollars which the defendants' wrong has rendered uncertain. Even as to the measurement of damage, however, these cases do not countenance mere speculation, and the court below correctly held that in this case there was no evidence from which either the fact of damage or an approximation of the amount could be made.

The petitioners urge that there was some evidence to establish the fact of their damage but that the Circuit Court of Appeals rejected such evidence, substituting its inferences and conclusions for those of the jury. The evidence relied on by the petitioners was to the effect that double features caused the decline in their profits shown by their calculations. (Pet., pp. 5, 7, 16.)

The Circuit Court of Appeals, characterizing the evidence about double features, said that prior to the use of double features the petitioners' theatre was able to obtain some pictures not previously used in the respondent exhibitors' theatres, "and this was available free of the restrictions of the Chicago system of release". The court further said that under double featuring this product was taken away by the respondents' prior contracts "and placed under

the restriction of the illegal system". (R. 2274-5). The petitioners seize on this language as justifying their statement that there was

> "uncontradicted evidence that in the earlier period petitioners' theatre made more money *because an open market was partly approximated* in that under single featuring there were still some pictures available to the Jackson Park Theatre outside the restrictions of the illegal system". (Pet., p. 16) (Italics ours.)

In view of the undisputed evidence stated above, the jury could not have reached any such conclusion as that the petitioners' experience with single features approximated an open market; nor can the Circuit Court of Appeals' opinion be so interpreted.

With both single features and double features there were no pictures available to the petitioners until after the respondent exhibitors had entered into license contracts for their prior run theatres. The "clear" pictures which the petitioners obtained were only those inferior pictures which the prior run theatres did not contract for or did not use. They were "outside the restrictions of the system" only in that sense, and not because they were obtained by competitive bidding. The petitioners did not have to compete for them either against prior run theatres, which did not want them, or against subsequent run theatres, which could obtain them only after the petitioners' theatre. They were contracted for at the same times, in the same manner and under the same terms, as to run, clearance and minimum admission prices as were all other pictures available to the petitioners. (R. 132-156.) Neither the terms

upon which they obtained such pictures, nor the profits which they were able to make with them, furnished any clue to what the petitioners could have obtained, or what profits they could have made, bidding for pictures against their competitors in an open market.

Even if it be assumed, therefore, that plaintiffs' profits under the illegal system were reduced as a result of double featuring, there still is no evidence from which it could be determined whether their profits, as so reduced, were more or less than they would have been but for the conspiracy. The Circuit Court of Appeals correctly concluded that even after taking into consideration the evidence as to double features there was no proof of either the fact or the amount of the petitioners' claimed damage. In so doing it did not substitute its inferences and conclusions for any which the jury properly could have drawn, for the evidence was undisputed and the conclusion of the Circuit Court of Appeals flowed from it as a matter of law.

The failure of the petitioners to prove the fact of damages under the peculiar facts of this case did not result from any inadequacy or harshness in the accepted rules for proving damage in private antitrust cases. The petitioners placed themselves in their present predicament by failing to take a position at any stage of this case as to when the conspiracy complained of began, or when it first affected the profits of their theatre. The present pattern of runs and clearance in Chicago was shown to have existed in its present form since about 1927. It was not created at any one time, but took shape over a period of years prior to that date, as new theatres were built and new runs and clearance were created for them. The theatres of whose prior runs and clearance the petitioners complain acquired their present playing posi-

tions before they became affiliated with any of the respondent distributors—that is, before the present conspiracy could have been formed with its alleged purpose of favoring such affiliated theatres. (R. 204-208, 407-414, 659-664.) The practice of the distributors of selecting the theatres they desired to license in each run and licensing them in the order of runs so determined was shown by the petitioners' own evidence to have been followed since at least 1927, and must have originated at some unknown time before that. (R. 136-156.) It was this failure of the petitioners to show when the conspiracy began or to show that, before the conspiracy, their theatre was in any different position with respect to the claimed right to bid for runs and clearances, rather than, as the petition claims, the mere fact that the conspiracy existed for a long time, which accounts for the petitioners' inability to show what the profits of their theatre were at some time when it was free of the restraints allegedly imposed upon it by the conspiracy. Lacking this proof, the petitioners failed to come forward with any other proof to show what the profits of their theatre would have been at any time if they or their predecessors had been permitted or obliged to bid against their competitors for run and clearance. If such proof was impossible, as the petition intimates, it must be because there is no way of knowing whether the conspiracy made the petitioners' business more or less profitable than it otherwise would have been. The rules laid down by the courts for proof of the fact of damage do not inhibit the proof of that fact in cases where its existence is logically demonstrable.

The petitioners allege as error, although not as a ground for the granting of a writ of certiorari, that the Circuit

Court of Appeals stated that they had abandoned their prayer for equitable relief." (R. 2271.) The petitioners did not intend to abandon such prayer and the respondents have never contended that it was abandoned. The Record shows that on motion of the petitioners the prayer for equitable relief was continued until after the disposition of the appeal from the judgment at law, petitioners' counsel being of the opinion that such appeal probably would dispose of all disputed issues involved in the prayer for equitable relief. (R. 2096.)

The matter was not discussed orally or in the briefs before the Circuit Court of Appeals. Whether or not that court was correct in saying that the prayer for equitable relief was abandoned is not a ground for granting a writ of certiorari because it is not involved in the judgment at law sought to be reviewed. It probably never will become an issue because the respondents have no intention of opposing the taking up of the equitable issues by the trial court on the ground of abandonment by the petitioners. Such an objection, even if successful, would merely result in the filing of a new bill raising the same issues.

III.

ARGUMENT

A. The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court.

The petitioners cite *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, as authority for the proposition that proper proof of the fact of damage may be dispensed with if the defendants have made it impossible for the plaintiff to produce such proof. That case does not so hold.

The quotations from the *Story Parchment Co.* case in the petition herein (pp. 14-15) refer only to the *amount*, the *extent* and the *measurement* of the plaintiff's damages. The petition does not quote that part of this Court's opinion which holds:

> "* * * It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (p. 562.)

The Circuit Court of Appeals in this case properly distinguished between the fact of damage and the measurement of damage and correctly said that the language in the *Story Parchment Co.* case relied upon by petitioners related only to the measurement of damage.

This Court held in *Keogh v. C. & N.W. Ry. Co.*, 260 U. S. 156, 164:

> "Under § 7 of the Anti-Trust Act * * * recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture."

To the same effect are:

Glenn Coal Co. v. *Dickinson Fuel Co.*, 4 Cir., 72 F. 2d 885;

Hart v. *B. F. Keith Vaudeville Exchange*, 2 Cir., 12 F. 2d 341; cert. den. 273 U. S. 705;

Jack v. *Armour & Co.*, 8 Cir., 291 Fed. 741;

Twin Ports Oil Co. v. *Pure Oil Co.*, 8 Cir., 119 F. 2d 747, 750; cert. den. 314 U. S. 644;

Northwestern Oil Co. v. *Socony-Vacuum Oil Co.*, 7 Cir., 138 F. 2d 967, 970; cert. den. 321 U. S. 792.

Clark Oil Co. v. *Phillips Petroleum Co.*, 8 Cir., 148 F. 2d 580; cert. den. Oct. 8, 1945.

The petition next cites *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, as authority for the proposition that profits made while the conspiracy complained of was in existence may be used by the plaintiff as a basis for proving and computing his damages. It is true that in that case the loss of profits resulting when the plaintiff's established trade in the defendant's goods was completely taken away from it was allowed to be proved by profits which the plaintiff made while handling the defendant's goods under restricted terms of sale unlawfully imposed by the defendant. However, this Court, in approving such proof of damage, said:

> "There was also affirmative evidence, not contradicted, tending to show that under the defendant's restricted terms of sale the dealers' profits did not exceed those on the sale of goods of other manufacturers not parties to the monopoly." (p. 377.)

This Court also approved instructions given to the jury that:

> "*** even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant to the extent that they had been increased by the monopoly and exceeded those in a normal business, but that they must be reduced to the basis or normal profits." (p. 377.)

It is clear that in the *Eastman Co.* case profits made while the monopoly was in effect were held competent in establishing the fact of damage only because there was evidence that such profits did not exceed those of other dealers not subject to the monopoly. There is no such proof in the case at bar.

The petitioners claim (Pet., p. 10) that one of their witnesses testified that their theatre could have done twice as much business in open competition. The Circuit Court of Appeals properly disposed of the same contention. It pointed out that such testimony would be a mere guess, in any event, but that in fact the witness had not so testified. He testified to the profits which he thought petitioners' theatre could have made advanced to an earlier run within the illegal system. (R. 263.)

In our Statement, *supra*, we have disposed of petitioner's contention (Pet., p. 11) that there was "uncontradicted evidence that in the earlier period petitioners' theatre made more money because an open market was partly approximated in that under single featuring there were still some pictures available to the Jackson Park Theatre outside

the restrictions of the illegal system." The statement simply is not true. The petitioners' theatre never had any experience in competing for any pictures by bidding on an open market, under either single features or double features.

B. The decision of the Circuit Court of Appeals was not in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit.

The petitioners cite *William H. Rankin Co.* v. *Associated Bill Posters of U. S.*, etc., 2 Cir., 42 F. 2d 152, as authority for the proposition that an "estimate", such as the witness Salkin's supposed statement as to how much business the petitioners' theatre could have done in an open market, is competent evidence to establish damage. That case does not so hold. The court in that case said:

> "In its proof of damages, Rankin was permitted, under objection and exception, to show by the testimony of its treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when free of the defendants' unlawful interference, what he considered would have been the normal increase of this plaintiff's business from year to year." (p. 155.)

Thus, fact of damage in that case was determined from evidence of the plaintiff's business when free of the alleged monopoly or restraint.

The court further said in that case:

> "* * * There was no speculation as to the fact of actual damage. Its business had been seriously curtailed." (p. 155.)

That the Circuit Court of Appeals for the Second Circuit had no intention of holding in the *William H. Rankin Co.* case that a mere estimate is competent proof of the fact of damage is made clear by its subsequent decision in *Baush Mach. Tool Co. v. Aluminum Co. of America*, 2 Cir., 79 F. 2d 217, 227, where it said:

> "The plaintiff was permitted to show by Haskell his estimate of its loss of profits during the period for which recovery was permitted. As there had never been any profits and no reasonable prospect that any would be made was shown as of 1925, his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible. *Eastman Kodak Co. v. Blackmore* (C. C. A.) 277 F. 694; *American Sea Green Slate Co. v. O'Halloran* (C. C. A.) 229 F. 77; *Central Coal & Coke Co. v. Hartman* (C. C. A.) 111 F. 96. In *Wm. H. Rankin Co. v. Associated Bill Posters*, 42 F. (2d) 152, we upheld the admission of an estimate of lost profits, but there was a proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success."

The petitioners also cite *Package Closure Corporation v. Sealright Co.*, 2 Cir., 141 F. 2d 972. That case involved only the sufficiency of the plaintiff's complaint, which was dismissed on motion by the trial court. The complaint alleged:

> "Based on plaintiff's business experience in and after 1937, its profits for the three years begin-

ning with 1941 would have amounted to at least $275,000." (p. 974.)

There was no discussion in the opinion, and no occasion for any, as to what evidence of "business experience" or other facts might support this allegation, which the reviewing court held sufficient. (pp. 976, 979.)

The Circuit Court of Appeals' decision in this case correctly followed the decisions of the court for the Second Circuit as well as the decisions of other Circuit Courts of Appeals and of this Court cited under Point A hereof.

C. The Circuit Court of Appeals did not substitute its inferences for those of the jury on the question of damages.

The cited case of *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544 (Pet., p. 18) has no bearing upon this case. The court below did not reject the evidence of profits made in petitioners' theatre before 1936 because it was then under different ownership, but because there was no evidence as to how its profits in that period compared with the profits it might have made but for the conspiracy.

Nor did the Circuit Court of Appeals substitute its inferences for those of the jury, contrary to the decision in *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U. S. 29, cited by petitioners (Pet., p. 19). It did not reject the evidence that double featuring caused the petitioners' profits to decline under the conspiracy, but, as we have shown, such evidence did not at all tend to show what the petitioners' profits would have been but for the unlawful conspiracy which prevented them from bidding for runs and clearance.

CONCLUSION

It is respectfully submitted that the decision herein of the Circuit Court of Appeals is in full accord with the applicable decisions of this Court and of other Federal courts and that no ground exists for granting the petition for a writ of certiorari.

October 13, 1945.

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